Week in Regulation

Methane Rule Leads Busy Week

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After a relative lull in the week prior, this past week saw a noticeable uptick in regulatory activity. There were 17 rulemakings with some measurable economic impact, some cost-cutting and some cost-increasing. An Environmental Protection Agency (EPA) proposal regarding methane emissions, however, provided the vast majority of the week's regulatory impact. Across all rulemakings, agencies published $6.5 billion in total net costs and added 1.4 million annual paperwork burden hours.

REGULATORY TOPLINES

- Proposed Rules: 41
- Final Rules: 63
- 2021 Total Pages: 66,046
- 2021 Final Rule Costs: $19.9 billion
- 2021 Proposed Rule Costs: $192.2 billion

NOTABLE REGULATORY ACTIONS

The most significant action published this past week was EPA's proposed rule regarding "Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review." The proposal, which was technically released earlier this month, marks the Biden Administration's most notable action regarding methane emissions to date. The American Action Forum (AAF) broke down the rulemaking's details here. EPA estimates that the rule's requirements would cost affected entities $6.3 billion from 2023 through 2035.

In terms of cost-reducing measures, the most significant action was a Drug Enforcement Administration (DEA) proposal on "Transfer of Electronic Prescriptions for Schedules II-V Controlled Substances Between Pharmacies for Initial Filling." As the title suggests, the proposed rule would amend DEA regulations to clarify the circumstances under which pharmacies can transfer electronically-based prescriptions for initial fillings among each other. The last time DEA revisited the regulations practice was in 2010, so thus, in light of both market trends and certain policy developments since then (such as legislation mandating that certain opioid prescriptions take a secured, electronic form), the agency looks to revisit its requirements. While there will still be some costs in reporting these transfers to DEA (1.25 million hours of total paperwork), the agency estimates that the proposal could save affected entities roughly $90 million by making the overall process more efficient.

TRACKING THE ADMINISTRATIONS

As we have already seen from executive orders and memos, the Biden Administration will surely provide plenty of contrasts with the Trump Administration on the regulatory front. And while there is a general expectation that the new administration will seek to broadly restore Obama-esque regulatory actions, there will also be areas where it charts its own course. Since the AAF RegRodeo data extend back to 2005, it is possible to provide weekly updates on how the top-level trends of President Biden's regulatory record track with those of his two most recent predecessors. The following table provides the cumulative totals of final rules containing some quantified economic impact from each administration through this point in their respective terms.

TRACKING THE ADMINISTRATIONS

REGULATORY ACTIVITY FROM INAUGURATION DAY TO NOVEMBER 19th

	FINAL RULES	FINAL RULE COSTS	PAPERWORK HOURS
BIDEN 2021	200	$19.4B	125M
TRUMP 2017	196	$8.3B	8.9M
OBAMA 2009	258	$30.3B	20.3M

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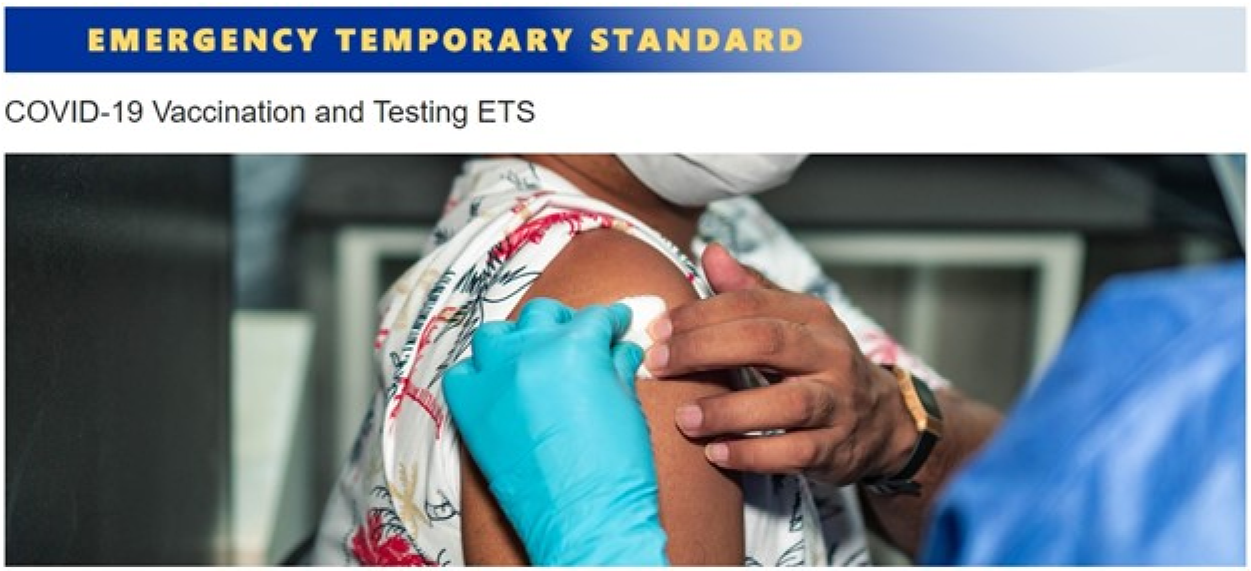
With the most impactful rulemaking of the week coming on the proposed rule side, the to-date *final rule* tally for the Biden Administration only saw modest increases. Its two predecessors, however, saw notable developments in the middle of November 2017 and 2009, respectively. For the Trump Administration, after a week that saw its paperwork total dip into the net-negative, that number jumped back up to almost nine million hours on the net-positive side of the ledger. A Consumer Financial Protection Bureau rule on payday loans provided the bulk of this increase. For the Obama Administration – in a bit of role reversal – there was noticeable decrease in regulatory burdens. An EPA rule amending spill prevention standards was the main driver of that trend with $95 million in cost reductions and 1.3 million fewer hours of paperwork.

THIS WEEK'S REGULATORY PICTURE

This week, the Occupational Safety and Health Administration (OSHA) tries to bolster its vaccine mandate.

On November 18, OSHA published a "ratification" notice in the Federal Register to try to cut off one argument in legal challenges against its COVID-19 Vaccination and Testing; Emergency Temporary Standard (ETS).



The ETS was signed by James Frederick, who was the acting OSHA administrator at the time the ETS was issued. In lawsuits challenging the ETS, some have challenged his authority to sign it. "Out of an abundance of caution" Secretary of Labor Martin Walsh issued the ratification notice asserting that he has independently reviewed the rule and agrees that it is necessary. The action is designed to bolster OSHA's authority to issue the standard in ongoing litigation.
Whether the ratification will help OSHA's case, or even matter, is unclear. On November 12, the U.S. Court of Appeals for the Fifth Circuit issued a stay on the rule and ordered OSHA to "take no steps to implement or enforce the Mandate until further court order." That order found numerous legal issues with OSHA's ETS but did not address whether Frederick had authority to issue it.

Instead, the court found other deficiencies. The court believes OSHA is unlikely to have the authority to issue "sweeping pronouncements on public health." Even if it does, the ETS is simultaneously overinclusive – covering all industries – and underinclusive – not applicable to companies with fewer than 100 employees. The underinclusive aspects of the ETS undermined its overinclusive nature, which raised doubt about its necessity.

Courts have historically been skeptical of ETSs, and typically only uphold them when they are narrowly targeted. The court's opinion, in contrast, terms the ETS as a "one-size-fits-all sledgehammer." The court also found that OSHA cannot show that COVID dangers exist in all workplaces, and several other legal flaws in the ETS.

While OSHA will appeal the stay ruling, that issue and the merits of the case will be determined by the Sixth Circuit, which "won" a lottery drawing this week to determine what circuit court will hear the consolidated challenges to the ETS (of which there are many).

TOTAL BURDENS

Since January 1, the federal government has published $212.1 billion in total net costs (with $19.9 billion in new costs from finalized rules) and 135.3 million hours of net annual paperwork burden increases (with 127.6 million hours in increases from final rules).